

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:)	Chapter 11
)	
CIRCUIT CITY STORES, INC.,)	Case No. 08-35653-KRH
et al.,)	
)	
)	Jointly Administered
Debtors.)	
_____)	

**RITZ MOTEL COMPANY’S VERIFIED MOTION FOR AN ORDER
COMPELLING DEBTORS TO IMMEDIATELY PAY POSTPETITION RENT
AND OTHER POSTPETITION OBLIGATIONS**

Ritz Motel Company (“Lessor”) moves the Court for an order compelling Circuit City Stores, Inc. (“Lessee”), a debtor in these bankruptcy cases, to pay Lessor \$23,629.17, the amount due November 30, 2008 under a lease entered into by Lessor, as assignee, and Lessee on February 28, 1992 (the “Lease”), for the Lessee’s continuing possession of nonresidential real property located at 5400 Brodie Lane, Austin, Texas 78745 (the “Premises”), as mandated by 11 U.S.C. §§ 365(d)(3) and 503(b).

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1. The Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). The statutory bases for the relief requested are 11 U.S.C. §§ 365(d)(3) and 503(b).

2. The Lessee and affiliated debtors commenced these bankruptcy cases on November 10, 2008 (the “Petition Date”). Lessee has neither assumed nor rejected the Lease under 11 U.S.C. § 365(a).

3. The Lease obligates Lessee to pay Lessor \$23,629.17 on the last day of each month for that month’s rent and other charges.

4. Despite Lessor’s demand for payment, Lessee did not pay the payment due under the Lease on November 30, 2008 (the “November 30 Payment”).

5. Section 365(d)(3) of the Bankruptcy Code provides that a trustee or debtor-in-possession “shall timely perform all the obligations of the debtor ... arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected” 11 U.S.C. § 365(d)(3).

6. Courts are divided over the application of § 365(d)(3) where the amount owing accrued both before and after commencement of the bankruptcy case. Some courts, including this court in *In re Trak Auto Corporation*, 277 B.R. 655, 665 (Bankr. E.D. Va. 2002) *rev’d on other grounds* 367 F.3d 237 (4th Cir. 2004), apply the “proration method”, which requires payment only of those amounts accruing postpetition, regardless of whether the billing date occurred pre- or postpetition. Other courts apply the “billing method”, which mandates full payment of all amounts with a postpetition billing date, regardless of whether those amounts accrued pre- or postpetition. *See, e.g., In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 209 (3d Cir. 2001).

7. In Debtors' Omnibus Objection to the Motions Pursuant to 11 U.S.C. §§ 365(a) and 503(b) to Compel Allowance and Payment of Post-Petition Rental Obligations as Administrative Expenses [Docket No. 641], filed with the Court December 3, 2008, Debtors ask the court to reconsider its decision in *Trak Auto* and adopt the "billing method", in accordance with an earlier opinion of the Fourth Circuit Court of Appeals, *Rose's Stores v. Saul Subsidiary I, L.P. (In re Rose's Stores)*, 1998 U.S. App. LEXIS 15334 (4th Cir. 1998).

8. Applying the "billing method" urged by the Debtors, Lessee is obligated to immediately pay to Lessee the full November 30 Payment of \$23,629.17.

9. Even if the court were to adopt the "proration method," Lessee would be obligated to pay Lessor the postpetition prorated portion of the November 30 Payment, which in this case equals \$16,540.42.

10. Because Lessee has ignored its § 365(d)(3) obligations, this Court should authorize and direct Lessee (i) to immediately pay Lessor the November 30 Payment in full under the Debtors' preferred "billing method" or in-part under the "accrual method"; and (ii) to timely make all future payments as they become due under the Lease, including, without limitation, the Lessee's obligation to pay the real property taxes due no later than January 31, 2009.

11. Lessor is also entitled under the Lease to its reasonable attorney fees and costs expended in bringing this Motion to enforce the Lease. Accordingly, Lessor requests that the court authorize and direct the Lessee to pay such reasonable costs and fees.

12. No previous motion for the relief sought herein has been made to this Court or any other court.

13. Lessor respectfully requests that the Court treat this Motion as a written memorandum of points and authorities or waive any requirement that this Motion be accompanied by a written memorandum of points and authorities as described in Rule 9013-1(G) of the Local Rules of the United States Bankruptcy Court for the Eastern District of Virginia.

ACCORDINGLY, Lessor respectfully requests entry of an order in the form attached as Exhibit A: (A) authorizing and directing Lessee to (i) immediately pay to Lessor \$23,629.17 which became payable November 30, 2008 under the Lease, or alternatively the postpetition prorated amount of \$16,540.42; (ii) timely make all future payments as they become due under the Lease, including without limitation future rent payments and real property tax obligations; (iii) reimburse Lessor's reasonable attorney fees and costs incurred in bringing this Motion; and (B) granting such further relief as the court deems appropriate.

Respectfully submitted,

By: /s/ John D. McIntyre
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Lead Counsel for Ritz Motel Company

I, Frederick Goldberg, declare that I am an owner of Ritz Motel Company ("Ritz") and am authorized, pursuant to applicable law and rules, to verify the foregoing Verified Motion for an Order Compelling Debtors to Immediately Pay Postpetition Rent on behalf of Ritz and that the foregoing Verified Motion is hereby verified on behalf of Ritz. I make this statement under penalty of perjury.

/s/ Frederick Goldberg
Frederick Goldberg

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2008, a true and complete copy of the foregoing was served using the Court's ECF System to all registered users of the ECF system that have filed notices of appearance in this case and sent by first class mail, postage prepaid to the parties set forth below:

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